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No. 79-1580

In the Supreme Court of the United States

OCTOBER TERM, 1979

MALCOLM BRITTON WOOTEN

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 4a-8a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 16, 1980. A petition for rehearing was denied on March 13, 1980 (Pet. App. 9a). The petition for a writ of certiorari was filed on April 9, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial court committed reversible error in allowing the government to call two witnesses whom it had been advised would claim the privilege against self-incrimination and who in fact did claim the privilege.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Kentucky, petitioner, Marshall Clay Riddle, Jacqueline Riley, and Ralph Bernius were convicted of conspiracy to transport women in interstate commerce for the purpose of prostitution and to facilitate and distribute the proceeds of business enterprises involving prostitution, in violation of 18 U.S.C. 371.[1] Petitioner was sentenced to a term of five years' imprisonment. The court of appeals affirmed (Pet. App. 4a-8a).

The evidence is summarized in the opinion of the court below. It showed a multi-state prostitution ring with co-defendant Riddle at the core of the conspiracy. The illegal activities were centered in Northern Kentucky, and prostitutes connected with Riddle were sent to various truck stops, motels, apartments, bars, and massage parlors. At trial ten women testified as government witnesses about their activities as prostitutes.

As the court of appeals noted (Pet. App. 5a), petitioner conceded that he arranged prostitution activities but denied any connection with Riddle. The evidence connecting petitioner to the conspiracy, however, included testimony that in late December 1976 or early January 1977, petitioner participated with Riddle in making plans for Julie Hahn, Darlene Seng and Judy Richards to travel from Ohio to Florida, where they would contact a "Florida connection," co-defendant Jerry Reese, and engage in acts of prostitution (Tr. 147-149, 198, 232-233, 1353-1354). Hahn and Seng were prostitutes who worked

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[1]Riddle and Bernius were also convicted of substantive violations under the Travel Act, 18 U.S.C. 1952. Nine other defendants pleaded guilty to either conspiracy or a substantive violation. Riley is the petitioner in No. 79-6093, pending in this Court on a petition for writ of certiorari.

for Riddle (Tr. 1320-1322); Richards said that she worked for petitioner (Tr. 1355). Thereafter, in January 1977, Hahn, Seng, and Richards went to Florida in Seng's car and met Reese (Tr. 1346, 1350, 1355-1358).[2] They initially stayed together (Tr. 271), although Richards did not stay for the entire trip. Hahn, testifying as a government witness, admitting performing acts of prostitution in Florida (Tr. 1356).

In late 1976, petitioner gave Riddle the name of a prostitution site in Atlantic City, because "there was good money there" (Exh. 13; Tr. 740-741, 1293-1295). Other evidence showed that petitioner had received the earnings of prostitutes (Tr. 684-688, 1736-1740, 1744-1745, 1758) and had attempted to recruit prostitutes to work for him (Tr. 1077-1078, 1344, 1365-1366).

2. Wanda Spradlin and Judy Richards refused to testify on grounds of self-incrimination when they were called as witnesses by the government. In each instance, before they were called to the stand, the district court was advised outside of the presence of the jury that they might so refuse to testify (Pet. App. 10a-13a, 22a-25a). Thereafter, with the court's permission, the government asked Spradlin in the jury's presence whether she knew Riddle, Bernius, petitioner, or Riley and whether she had worked as a prostitute (*id.* at 14a-15a). The court also permitted the government to ask Richards whether she knew Seng or Hahn and whether she had ever worked as a prostitute (*id.* at 26a-27a). When the two witnesses refused to answer these questions and said that they would refuse to answer any other questions, they were excused. Thereafter, in each instance, the court instructed the jury that a witness has a personal right under the

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[2]Reese in turn sent two women to the Cincinnati area to work as prostitutes for Riddle (Tr. 285-290, 348-349).

Constitution to refuse to testify and "since it is a personal matter, it is not in any way to be considered by the jury as any evidence whatsoever against any of the defendants. It's strictly her personal right and no one else has control over that except her, and it's the same as if she testified to nothing" (*id.* at 15a-16a; Tr. 419).[3]

ARGUMENT

Petitioner's sole contention, relying on *Namet* v. *United States*, 373 U.S. 179 (1963), and *Douglas* v. *Alabama*, 380 U.S. 415 (1965), is that reversible error occurred when the prosecutor called Spradlin and Richards to the stand knowing that they would probably claim the privilege against self-incrimination. Petitioner asserts that asking these witnesses questions in the jury's presence constituted prosecutorial misconduct. In the circumstances of this case, the court below properly rejected this contention.

In *Namet* the government called two witnesses who had previously pleaded guilty to charges similar to those on which the defendant was subsequently convicted. These witnesses interposed the privilege against self-incrimination as to certain questions seeking to elicit information concerning their relationship with the defendant, and the privilege was upheld. The prosecutor had previously been advised by defense counsel that the witnesses, if called, would invoke the privilege against self-incrimination. In affirming the conviction, the Court stated that the prosecutor was not guilty of misconduct because the non-privileged testimony given by the witnesses had substantial value to the government's case. The Court then held that it could not find that "the few

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[3]When two other witnesses also refused to testify (Tr. 1275, 1723), the trial court also admonished the jury (Tr. 1278, 1732-1733). No issue is raised here concerning these refusals.

invocations of privilege by the [two witnesses] were of such significance in the trial that they constituted reversible error even in the absence of prosecutorial misconduct," in view of the other evidence before the jury. 373 U.S. at 189.

In *Douglas* v. *Alabama*, *supra*, however, this Court found reversible error in a prosecution for assault with intent to murder where a prosecutor called as a witness a co-defendant who had previously been found guilty. The prosecutor had been advised that the witness would rely on the privilege against self-incrimination and would not answer any questions. The prosecutor produced a document, said to be a confession signed by the witness that named the defendant as the person who fired the shotgun blast that wounded the victim. The prosecutor then began to read the prior statement, pausing after every few sentences to ask the witness if he made the statement. Each time the witness refused to answer the question, but the prosecutor continued his questioning until the entire document was read. This Court concluded that this procedure denied the defendant the right to cross-examination secured by the Confrontation Clause of the Sixth Amendment. It said (380 U.S. at 420): "The alleged statements clearly bore on a fundamental part of the State's case against petitioner. The circumstances are therefore such that 'inferences from a witness' refusal to answer added critical weight to the prosecutor's case in a form not subject to cross-examination, and thus unfairly prejudiced the defendant.' "

As in *Namet* and unlike in *Douglas*, the inferences from the refusal of the two witnesses to answer in the present case did not unfairly prejudice petitioner or add critical weight to the government's case. The prosecutor asked both women whether they were prostitutes and asked Spradlin whether she knew any of the four defendants.

Their refusals to answer these questions could not have had much effect in a case in which six of the ten prostitutes who testified knew petitioner, including three who said that he had recruited them to work for him in the prostitution business. Richards also declined to answer whether she knew Hahn and Seng but not petitioner. This was not prejudicial. Hahn was questioned extensively on both direct and cross-examination (Tr. 1232-1233, 1279-1281). A hotel registration card showed that Richards registered at the same time with Hahn and Seng in a Florida hotel on January 17, 1977 (Tr. 271; Exhs. 18 and 20). Petitioner was not even mentioned in the interrogation of Richards.

Nor was the prosecutor chargeable with misconduct, as petitioner asserts (Pet. 11-13). He did not question the witnesses before the jury until the court had been told that the witnesses might claim the privilege against self-incrimination and had authorized him to proceed. He asked only the questions that the court had in advance said he could ask. While it may have been preferable to have questioned the women outside the presence of the jury, petitioner did not suggest such a procedure (see Pet. App. 10a-27a). Significantly, the trial court gave admonitions that the refusal to testify was equivalent to the witness testifying to nothing, and such admonitions have been said to cure any error in calling a witness who asserts the privilege (Pet. App. 15a-16a). See *United States* v. *Maloney*, 262 F. 2d 535, 538 (2d Cir. 1959).[4]

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[4]Petitioner contends (Pet. 12) that the prosecutor had no basis for believing that Spradlin knew petitioner. The prosecutor, however, had a basis for believing Spradlin knew other members of the conspiracy (Pet. App. 19a-20a), and the Court ruled that a prima facie case of conspiracy between them and petitioner existed (*id.* at 21a). This is a sufficient factual predicate for asking the question.

Petitioner erroneously contends (Pet. 10-11) that the Sixth Circuit holds that a prosecutor may call a witness who he knows will claim a valid privilege for the purpose of impressing upon the jury the fact of the claim of privilege, so long as the prosecutor believes the witness possesses relevant and admissible information and the questions that provoke the claim of privilege are relevant. The Sixth Circuit has, however, never approved any such deliberate tactics. *United States* v. *Compton*, 365 F. 2d 1, 4-6 (6th Cir.), cert. denied, 385 U.S. 956 (1966), in fact reversed a conviction for persistent interrogation of a witness, after it was clear that the witness would invoke the privilege, by means of reading (as in *Douglas*) the witness's alleged confession implicating the defendant to the jury in the form of leading questions. To be sure, the Sixth Circuit allows the prosecutor to call a witness with pertinent information and to ask the witness any relevant and proper question concerning that information. See *United States* v. *Kilpatrick*, 477 F. 2d 357, 360 (1973). This much, however, is plainly permitted by *Namet*, where this Court made clear that a prosecutor is not prohibited from calling a witness merely because "it [is] known" that the witness plans to invoke the privilege. 373 U.S. at 185-186. What is proscribed is "a conscious and flagrant attempt to build [the prosecution's] case out of inferences arising from use of the testimonial privilege." *Id.* at 186.

Each case turns on its own circumstances concerning the extent of such an attempt and the extent of any prejudice. *Ibid.* In the present case, the prosecutor merely tested the witness's willingness to answer, limiting his questions to those permitted by the court. The episode was brief and followed immediate by customary instructions. The prosecutor did not use an improper form of question. He did not seek during the questioning

or thereafter in argument to wring inferences from the refusals to testify. Finally, the prosecutor did not seek to use the device as a means to use improper inferences. Nor could petitioner have been prejudiced by the questions and answers. The holding of the court of appeals, therefore, is fully consistent with this Court's decisions, and any error in the district court's action was harmless and would not warrant reversal.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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